

In the Matter of)
)
 ALLTEL Communications, Inc.) File No. EB-05-SE-084

Released: April 22, 2005

⁵See *Cingular Wireless LLC*, 18 FCC Rcd 11746 (2003) (“*Cingular GSM Consent Decree*”); *Cingular Wireless LLC*, 17 FCC Rcd 8529 (2002) (“*Cingular TDMA Consent Decree*”); *AT&T Wireless Services, Inc.*, 17 FCC Rcd (continued....)

affiliates, partners, and any successors or assigns.”⁶ The Consent Decrees do not further define what constitutes “successors or assigns.”

3. In 2004, the Commission approved Cingular’s acquisition of AT&T Wireless, conditioned upon Cingular’s post-transaction divestiture of certain wireless assets and spectrum holdings in designated local mobile telephony markets.⁷ Implementing the post-transaction divestiture conditions, Cingular and ALLTEL filed transfer of control applications, in which ALLTEL sought to acquire wireless properties, consisting of spectrum holdings and network assets or just spectrum holdings, in 18 of the designated local mobile telephony markets.⁸ On April 8, 2005, the Wireless Telecommunications Bureau granted these transfer of control applications.⁹

4. In connection with the transfer of control applications, ALLTEL filed the instant petition.¹⁰ As ALLTEL will be acquiring spectrum, TDMA and GSM network assets, and subscribers from Cingular,¹¹ ALLTEL seeks a ruling that it not be deemed a successor or assign subject to the terms and conditions of the Consent Decrees. ALLTEL maintains that it would be unreasonably burdensome to treat it as a successor or assign for purposes of the Consent Decrees. Specifically, ALLTEL states that the Consent Decrees should not apply to it because the Decrees arose out of investigations into Cingular’s possible violations of the E911 Phase II rules, and, as such, were carrier-specific (relating only to Cingular, a Tier I nationwide carrier) and technology-specific (applying to Cingular’s deployment of its

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19938 (2002) (“*AT&T Wireless GSM Consent Decree*”); *AT&T Wireless Services, Inc.*, 17 FCC Rcd 11510 (2002) (“*AT&T Wireless TDMA Consent Decree*”).

⁶See *Cingular GSM Consent Decree*, 18 FCC Rcd at 11748 ¶ 2(c); *Cingular TDMA Consent Decree*, 17 FCC Rcd at 8531 ¶ 2(c). The Consent Decrees with AT&T Wireless similarly define “AT&T Wireless” as including its “subsidiaries, and any successors or assigns.” See *AT&T Wireless GSM Consent Decree*, 17 FCC Rcd at 19941 ¶ 3(c); *AT&T Wireless TDMA Consent Decree*, 17 FCC Rcd at 11514 ¶ 6(c).

⁷See *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Transfer of Control of Licenses and Authorizations*, 19 FCC Rcd 21522, 21620-24 ¶¶ 254-66 (2004) (detailing the divestiture conditions).

⁸See *ALLTEL Corporation and Cingular Wireless LLC Seek Consent to Transfer of Control of Alltel Newco LLC*, Public Notice, DA 05-389 (WTB, February 14, 2005).

⁹See Public Notice, Report No. 2124 (WTB, April 13, 2005).

¹⁰ALLTEL concurrently filed a petition with the Wireless Telecommunications Bureau, seeking a limited waiver of the applicable Phase II benchmarks in order to transition customers in the affected markets from Cingular’s TDMA and GSM networks to ALLTEL’s CDMA network. See ALLTEL Communications, Inc. Petition for Limited Waiver, CC Docket No. 94-102, filed March 21, 2005. ALLTEL’s waiver petition will be addressed separately by the Wireless Telecommunications Bureau.

¹¹ALLTEL noted that in ten of the eighteen markets which it is acquiring from Cingular, it will obtain either spectrum and network assets, or spectrum only, but not subscribers. In these ten markets, ALLTEL will commence service using CDMA-only technology and will provide Phase II service exclusively via an A-GPS handset-based solution. In the remaining eight markets, ALLTEL will obtain spectrum, network assets and subscribers. In these eight markets, ALLTEL plans to expeditiously deploy CDMA technology and transition existing subscribers to its CDMA network and handset-based solution. Petition at 4-5. However, ALLTEL states that it will continue to meet all of Cingular’s current E911 Phase I and Phase II obligations using a network-based solution as long as it has TDMA and GSM subscribers in those markets. Petition at 14.

network-based location technology and its TDMA and GSM equipment).¹² In contrast, ALLTEL states that it is not, and has not been, the target of any E911 investigations, that it is a regional Tier II carrier, that it utilizes CDMA-based equipment and handset-based location technology, and that it is subject to the E911 Phase II handset-based solution benchmarks established for Tier II carriers.¹³ ALLTEL further asserts that it is not a successor or assign under either traditional corporate law's general rule of successor non-liability and its four exceptions,¹⁴ or under the alternative "substantial continuity" test the Commission has used in one instance.¹⁵

5. As ALLTEL correctly notes, the Consent Decrees do not define what constitutes "successors or assigns" for purposes thereof. Likewise, neither the Communications Act nor the Commission's rules define "successor" or "assign." The Commission has stated that "a successor or assign analysis is ultimately fact-based" and that the terms successor and assign "take their meaning from the particular legal context in which they were used."¹⁶ The Commission has further stated that in considering the particular facts and the legal context, courts have generally looked for "substantial continuity" between two companies such that one entity steps into the shoes of, or replaces, another entity.¹⁷ Considering the particular facts and legal context before us, we do not believe that there will be "substantial continuity" between Cingular and ALLTEL. Following the transaction, Cingular and ALLTEL will both continue to operate as competing, independent, going concerns in all of the subject markets, each with their own assets and customers. Thus, ALLTEL will not simply be stepping into Cingular's shoes and "substantially continuing" Cingular's business operations. Accordingly, we find that ALLTEL's acquisition of the select wireless properties from Cingular will not render it a successor or assign for purposes of the Consent Decrees.

6. We believe that our finding is consistent with the Commission's *Stay Order*, which addressed how mergers and acquisitions will affect a carrier's classification, and thus its obligations, under the E911 Phase II rules. Specifically, the *Stay Order* stated:

To promote certainty about the scope of a carrier's obligations, each carrier will retain its classification throughout the E911 Phase II deployment process, absent a merger or acquisition.

¹²Petition at 3-5.

¹³*Id.*

¹⁴*See, e.g., North Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642 (7th Cir. 1998). The four exceptions to the general rule of successor non-liability are: (1) the purchaser expressly or impliedly agrees to assume the liabilities; (2) the transaction is a de facto merger or consolidation; (3) the purchaser is a "mere continuation" of the seller; and (4) the transaction is an effort to fraudulently escape liability. *Id.* at 651.

¹⁵*Applications of Ameritech Corp. and SBC Communications, Inc.*, 14 FCC Rcd 14712 (1999) ("*Ameritech-SBC Order*"), *rev'd on other grounds sub nom., Assoc. of Communications Enterprises*, 235 F.3d 662 (D.C. Cir. 2001) (applying the "substantial continuity" test to determine whether a carrier's affiliate was bound by the carrier's obligations).

¹⁶*Ameritech-SBC Order*, 14 FCC Rcd at 14897, 14900, citing *Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO*, 417 U.S. 249 (1974) (stating that determinations about successorship must be based on "the facts of each case and the particular legal obligation which is at issue" and that "there is and can be no single definition of 'successor' which is applicable in every legal context).

¹⁷*Ameritech-SBC Order*, 14 FCC Rcd at 14897 (citations omitted).

If a merger or acquisition occurs, a carrier will be classified according to its acquiring carrier's classification, absent special circumstances.¹⁸

As ALLTEL is the acquiring carrier in the transaction, the acquired wireless properties will be subject to ALLTEL's Tier II E911 Phase II obligations.

7. Furthermore, we do not believe that our finding will undermine the objectives of the E911 rules or the Consent Decrees.¹⁹ The Consent Decrees arose out of investigations of Cingular and AT&T Wireless for potential violations of their E911 Phase II obligations and by their terms were applicable to those carriers' GSM and TDMA networks. No similar findings of potential violations by ALLTEL of its E911 Phase II obligations under the *Stay Order* are at issue here. Post-acquisition, Cingular will continue to be subject to its own obligations under the Consent Decrees, while ALLTEL will remain subject to its own obligations under the *Stay Order*. Finally, we note that the transaction will not result in any disruption of E911 Phase II services. In this regard, in markets where ALLTEL acquires customers from Cingular, ALLTEL plans to expeditiously deploy CDMA technology and transition existing subscribers to its CDMA network and handset-based solution, but it has pledged to meet all of Cingular's current E911 Phase I and Phase II obligations using a network-based solution as long as it has TDMA and GSM subscribers in those markets.²⁰

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 1.2 of the Rules, the Petition for Declaratory Ruling filed by ALLTEL **IS GRANTED** to the extent indicated herein.

9. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent by first class and certified mail, return receipt requested, to Glenn S. Rabin, Vice President, Federal Regulatory Affairs, Alltel Communications, Inc., 601 Pennsylvania Ave., N.W., Suite 720, Washington, D.C. 20004.

FEDERAL COMMUNICATIONS COMMISSION

Linda Blair
Deputy Chief, Enforcement Bureau

¹⁸*Stay Order*, 17 FCC Rcd 14841, 14848 ¶ 23 (2002).

¹⁹*Id.* at 13-14.

²⁰*See* n. 11 *supra*.